

A Public Prosecutor v Mohd Aszzid Abdullah

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41-20 OF
2006-II

B 2006-11
HAMID SULTAN JC
18 JUNE 2007

C *Criminal Procedure — Prosecution — Prima facie case — Magistrate held that there was no prima facie case to answer — Whether prosecution had established a prima facie case which if unrebutted could convict the accused — Penal Code s 394 — Criminal Procedure Code 1965 ss 173(f), 307(6) — Evidence Act 1950 ss 3, 101*

D *Evidence — Burden of proof — Criminal case — Prima facie case — Magistrate held that there was no prima facie case to answer — Whether prosecution had established a prima facie case which if un rebutted could convict the accused —*

E *Penal Code s 394 — Criminal Procedure Code 1965 ss 173(f), 307(6) — Evidence Act 1950 ss 3, 101*

F The accused (respondent) was alleged to have entered into a house and assaulted a lady therein, tied her up and stole some items and was charged under s 394 of the Penal Code. Nobody witnessed the crime and the victim was unable to identify the accused. The magistrate acquitted the accused and this appeal was against his decision. The accused argued that, inter alia, the

G to implicate the offender's involvement in the case without taking into account the totality of the prosecution's evidence; that an identification parade could not be a safe ground for conviction when the victim positively asserted that she did not see the accused's face; the magistrate took into account irrelevant considerations and did not take into account relevant ones

H and he opined that the confession communicated by the evidence of the father was not in accordance with criminal law and that he held that the RM10,000 could have been obtained by any means.

I Held, dismissing the appeal:

- (1) Section 307(6) of the Criminal Procedure Code 1965 ('CPC') requires the appellant to set out 'the definite particulars of the point of law or fact' in the petition of appeal. To succeed in this appeal the prosecution

- must show at the prima facie stage that they have established (i) all the elements of the offence, (ii) proved the 'fact in issue' according to law as set out in s 3 of Evidence Act 1950 ('EA') to be read with s 101 EA, (iii) satisfied all the criteria laid by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and set out in the petition of appeal in what manner the trial court has erred in deciding (i), (ii) and (iii). A perusal of the memorandum of appeal did not reflect the rudimentary requirements which are necessary before the appeal can be heard. Not complying with the provision of s 307(6) of the CPC in its clear terms could be a ground to dismiss the appeal. However, the court was inclined to exercise the discretion and hear the appeal, notwithstanding the fact that the strict provision of s 307(6) of the CPC had not been complied with (see para 4).
- (2) The two stages of criminal proceedings are captured in s 173(f) of the CPC for trial before the subordinate courts and s 180 for trials before the High Court. There was a statutory duty for the prosecution to establish a prima facie case before the court is obliged to call for the defence. A prima facie case materially consists of more than two concepts related to EA. They are issues relating to standard of proof and weight of evidence or also referred to as probative value or probative force (see paras 9–11).
- (3) A prima facie case is established where there is sufficient evidence to be called upon to answer and evidence adduced by the prosecution must be such that it can only be overturned upon hearing evidence in rebuttal by the defence to the prosecution case. The force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts that exist did not happen. The court must at the close of the prosecution case undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offences have been established. The test is: is the evidence sufficient to convict the accused if he elects to remain silent? If there is any such doubt there can be no prima facie case. As the accused can be convicted on the prima facie evidence, it must reach a standard which is capable of supporting a conviction beyond reasonable doubt (see para 25).
- (4) The prosecution had not established a prima facie case. The prosecution must establish that it was the accused who robbed the victim. The victim said that she did not see the robber's face and could not identify him. The identification parade was an exercise in futility. The identity was a vital issue central to the allegation of the prosecution and failure by the prosecution to adduce sufficient evidence in support
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A of a fact in issue means that the prosecution failed to discharge the legal burden and thus failed in its over all contentions (see para 26(i)).

(5) The appellant said there was sufficient corroborative evidence to implicate the respondent on the ground that the foster father of the accused surrendered to the police one unit of hand phone, one SIM card and cash money amounting to RM1,000. This evidence did not refer to the respondent applying the maximum evaluation test and did not have any corroborative value (see p 38) (see para 26(ii)).

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C **[Bahasa Malaysia summary]**

Tertuduh (responden) didakwa telah memasuki rumah dan menyerang seorang wanita di dalamnya, mengikatnya dan mencuri beberapa barangan dan telah didakwa di bawah s 394 Kanun Keseksaan. Tiada seorang pun yang menyaksikan jenayah tersebut dan mangsa tidak dapat mengenalpasti tertuduh. Majistret telah melepaskan tertuduh dan rayuan ini adalah terhadap keputusannya. Tertuduh menegaskan antara lain majistret telah terkhilaf dalam undang-undang dan fakta apabila beliau memutuskan bahawa tiada perhubungan yang boleh dipercayai untuk membabitkan penglibatan pesalah dalam kes tanpa mengambil kira keseluruhan keterangan pendakwaan, bahawa kawad pengecaman tidak boleh menjadi alasan sabitan apabila secara positifnya menegaskan bahawa beliau tidak melihat wajah tertuduh, majistret mengambil kira pertimbangan yang tidak relevan dan tidak mengambil kira yang relevan dan beliau berpendapat bahawa pengakuan yang disampaikan melalui keterangan bapanya adalah tidak menurut undang-undang jenayah dan beliau memutuskan bahawa RM10,000 boleh jadi diperolehi melalui cara lain.

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G **Diputuskan, menolak rayuan:**

(1) Seksyen 307(6) Kanun Tatacara Jenayah ('KTJ') memerlukan perayu untuk menyediakan 'butiran yang pasti isu undang-undang atau fakta' dalam petisyen rayuan. Untuk berjaya dalam rayuan ini pendakwaan mestilah menunjukkan pada peringkat prima facie bahawa mereka telah membuktikan (i) kesemua elemen kesalahan; (ii) telah membuktikan 'fakta dala isu' menurut undang-undang seperti mana yang disediakan dalam s 3 Akta Keterangan 1950('AK') untuk dibaca bersama dengan s 101 AK; (iii) memenuhi kesemua kriteria yang digariskan oleh Mahkamah Persekutuan dalam *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 dan yang disediakan dalam petisyen rayuan dalam keadaan yang bagaimana mahkamah bicara terkhilaf dalam memutuskan (i), (ii) dan (iii). Penelitian memorandum rayuan tidak menggambarkan syarat asas yang penting sebelum rayuan boleh didengar. Tidak menuruti

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peruntukan s 307(6) KTJ dalam termannya yang jelas boleh menjadi alasan untuk menolak rayuan. Tetapi mahkamah telah enggan untuk menggunakan budi bicaranya dan mendengar rayuan, meskipun sesungguhnya bahawa peruntukan ketat s 307(6) KTJ tidak dipenuhi (lihat perenggan 4).

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- (2) Dua peringkat tatacara jenayah terdapat dalam s 173(f) KTJ untuk percabaran di hadapan mahkamah bawahan dan s 180 untuk percabaran di hadapan Mahkamah Tinggi. Adalah tanggungjawab statutori untuk pendakwaan untuk membuktikan kes prima facie sebelum mahkamah mewajibkan untuk memanggil pembelaan. Satu kes prima facie adalah mengandungi sesuatu yang penting lebih daripada dua konsep yang berkaitan dengan AK. Ianya adalah isu-isu yang berkaitan dengan standard pembuktian dan keberatan keterangan atau dirujuk juga sebagai nilai kebarangkalian atau kekuatan kebarangkalian (lihat perenggan 9–11).

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- (3) Satu kes prima facie dibuktikan apabila terdapatnya keterangan yang mencukupi untuk dipanggil untuk dijawab dan bukti yang dikemukakan oleh pendakwaan mestilah sesuatu yang hanya boleh dipatahkan semasa pendengaran keterangan dalam pematihan oleh pembelaan kepada kes pendakwaan. Kekuatan bukti yang dikemukakan mestilah yang mana, jika dipatahkan, ianya mencukupi untuk mendorong mahkamah untuk mempercayai kewujudan fakta yang dinyatakan dalam pertuduhan atau untuk mempertimbangkan kewujudannya yang berkemungkinan bahawa seorang lelaki yang cermat harus bertindak terhadap anggapan bahawa fakta yang wujud tidak berlaku. Mahkamah mestilah pada penutupan kes pendakwaan mengakujani satu penilaian positif kredibiliti dan kebolehpercayaan kesemua keterangan yang dikemukakan untuk menentukan sama ada elemen-elemen kesalahan telah dibuktikan. Ujiannya adalah; adakah keterangan mencukupi untuk mensabitkan tertuduh jika beliau memilih untuk berdiam diri? Jika terdapatnya kesangsian adalah tiada kes prima facie. Adalah di mana tertuduh boleh disabitkan atas bukti prima facie, ianya mestilah mencapai tahap yang mana boleh menyokong sabitan melangkaui batas keraguan (lihat perenggan 25).

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- (4) Pendakwaan tidak membuktikan kes prima facie. Pendakwaan mestilah membuktikan bahawa adalah tertuduh yang merompak mangsa. Mangsa menyatakan bahawa beliau tidak melihat muka perompak dan tidak dapat mengenal pastinya. Kawad pengecaman adalah dilakukan dengan sia-sia. Identiti adalah isu yang penting intipati kepada dakwaan pendakwaan dan kegagalan oleh pendakwaan untuk mengemukakan bukti yang mencukupi dalam menyokong fakta bermakna bahawa

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- A pendakwaan telah gagal untuk melepaskan beban pembuktian dan oleh itu kegagalan berkenaan keseluruhan penegasannya (lihat perenggan 26(i)).
- B (5) Perayu telah menyatakan bahawa terdapatnya keterangan menyokong yang mencukupi untuk membabitkan responden atas alasan bahawa bapa angkat tertuduh telah menyerahkan kepada polis satu unit telefon tangan, satu kad SIM dan wang tunai yang berjumlah RM10,000. Bukti ini tidak merujuk kepada responden menggunakan ujian penilaian yang maksimum dan tidak mempunyai nilai sokongan (lihat perenggan 26(ii)).]
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Notes

For cases on burden of proof of criminal cases, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 391–406.

- D For cases on prima facie cases, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957..

Cases referred to

- Arulpragasam all Sandaraju v PP* [1997] 1 MLJ 1 (refd)
- E *Balachandran v PP* [2005] 2 MLJ 301 (refd)
- Chan Sin v PP* [1949] 15 MLJ 106 (refd)
- Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 (refd)
- Dato' Mokhtar Hashim & Anor v PP* [1983] 2 MLJ 232 (refd)
- Ferguson v R* [1979] 1 WLR 94 (refd)
- F *Hwa Tua Tau v PP* [1981] 1 CLJ 123 (refd)
- Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 (refd)
- Jayasena v R* [1970] AC 618 (refd)
- Leken @ Delem Ak Gerik (m) v PP* [2007] 3 MLJ 730 (refd)
- Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65 (refd)
- G *Mancini v DPP (HL)* [1942] AC 1 (refd)
- Miller v Minister of Pensions* [1947] 2 All ER 372 (refd)
- Munusamy v PP* [1987] 1 MLJ 492 (refd)
- Nisar Ali v State of UP* AIR 1957 SC 366 (refd)
- PP v Basar* [1965] 1 MLJ 75
- H *PP v Chin Yoke* [1940] MLJ 47 (refd)
- PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 (refd)
- PP v Hisla bin Sulai (M)* [2007] MLJU 234 (refd)
- PP v Kasmin Soeb* [1974] 1 MLJ 230 (refd)
- PP v Krishna Rao all Gurumurthi* [2000] 1 MLJ 274 (refd)
- I *PP v Mohan Singh* [1999] MLJU 218 (refd)
- PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (refd)
- PP v Ong Cheng Heong* [1998] 6 MLJ 678 (refd)
- PP v Saare Hama & Anor* [2001] 4 MLJ 480 (refd)
- PP v Sarjeet Singh* [1994] 2 MLJ 290 (refd)

- PP v Sukumaran a/l Sudram* [1999] 4 MLJ 462 (refd) A
PP v Tan Sri Muhammad bin Muhammad Taib [1999] 2 MLJ 305 (refd)
R v Carr-Briant [1943] KB 607 (refd)
R v Ching [1976] 63 Cr App R7 (refd)
R v Gill [1963] 2 All ER 688 (refd)
R v Summers 36 Cr App R14 (refd) B
R v Turnbull [1977] QB 224 (refd)
Saminathan v PP [1955] 21 MLJ 121 (refd)
Woolmington v DPP [1935] AC 462 (refd)

Legislation referred to

- Criminal Procedure Code 1965 ss 173(f), 180, 307(6)
 Evidence Act 1950 ss 3, 9, 101, 102, 103
 Penal Code s 394

Fazillah Begum bte Abdul Ghani (Senior Federal Counsel, Attorney General in Chamber) for the appellant. D
Respondent in person.

Hamid Sultan JC:

[1] This is my judgment in respect of the prosecution's appeal against the decision of the learned magistrate, who, without defence being called, acquitted the respondent, on the ground that the prosecution has not established a prima facie case. E

[2] The respondent was charged under s 394 of the Penal Code which read as follows: F

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping. G

The respondent in this case has been alleged to have entered into a house and assaulted a lady therein and tied her up and stolen the items as set out in the charge. Nobody witnessed the crime. Further, the victim was not able to identify the perpetrator of the crime at the time of incident. The charge reads as follows: H

Bahawa kamu pada 20 Jun 2005 jam lebih kurang 6.30 pagi, di alamat No 90A, Lot 2416, Lorong Rubber Batar 14A, di dalam Bandar Kuching, di dalam Negari Sarawak, di dapati dengan sengaja melakukan samun harta kepunyaan Ch'ng Siew Ngo, No KP: 220424-13-5038 dan dengan sengaja mencederakan mangsa secara kekerasan. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh I

- A dihukum di bawah s 394 Kanun Keseksaan. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 394 Kanun keseksaan. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 394 Kanun keseksaan.
- B [3] The petition of appeal reads, inter alia, as follows: The learned magistrate erred in fact and in law when he; (i) held that there was no credible nexus to implicate the offender's (respondent) involvement in this case, without taking into account the totality of the evidence adduced by the prosecution witnesses and that the evidence of all the prosecution's witnesses remained unchallenged by the respondent; (ii) asserted that the identification parade cannot be a safe ground of conviction since the complainant in her testimony positively asserted that she did not see the face of the criminal and that mere identification as to race is insufficient, when at all times there were other sufficient evidence to implicate and convict the respondent; (iii) he took into account irrelevant considerations and failed to give due weight to relevant considerations, in particular, the fact that PW8 had corroborated the evidence of PW2 as to identification of the respondent; (iv) he considered that identification by PW2 was by race of the respondent when at all time there is no evidence to that effect; (v) he opined that the confession communicated by the evidence of the father was not in accordance with criminal law, which is self incriminating when at all time the evidence was not confession and therefore the father's evidence should be admitted; (vi) when he held that the RM10,000 could be obtained through various means without taking into account all relevant considerations and the totality of the evidence which incriminated the respondent with the said sums of money recovered; in particular the evidences of PW1, PW2, PW5, PW6 and PW7.
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- G [4] Section 307(6) of the Criminal Procedure Code 1965 ('CPC') requires in a mandatory nature for the appellant to set out 'the definite particulars of the point of law or fact' in the petition of appeal. I note in this instance, this appeal is grounded on the fact that the appellant has established a prima facie case before the learned magistrate but the learned magistrate has refused to rule so. To succeed in this appeal the prosecution must show at the prima facie stage that they have established; (i) all the elements of the offence; (ii) proved the 'fact in issue' according to law as set out in s 3 of Evidence Act 1950 ('EA 1950') to be read with s 101 of EA 1950 (iii) satisfied all the criteria laid by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and set out in the petition of appeal in what manner the trial court has erred in deciding (i) (ii) and (iii) stated above. A perusal of the memorandum of appeal does not reflect the rudimentary requirements which are necessary before the appeal can be heard. In *Leken @ Delem Ak Gerik (m) v Public Prosecutor* [2007] 3 MLJ 730, I have stated that s 307(6) must be complied with and I will not dismiss the petition without giving proper
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opportunity to the appellant to amend the petition of appeal. That proposition must not be seen to apply for the State when they are duty bound to see that the provisions of the law are respected and adhered to. Not complying with the provision of s 307(6) of CPC in its clear terms can be a ground to dismiss the appeal. However, on the facts of this case, I am inclined to exercise the discretion and hear the appeal, notwithstanding the fact that I take the view that strict provision of s 307(6) of the CPC has not been complied with. What the appellant had stated in the petition of appeal only amounts to general grievance without identifying the law and facts. This is not sufficient in law. Such matters may further be compounded where the appellant does not take the trouble to summarise the brief facts of the case in their submission or place their argument in a cohesive manner to assist the court to arrive at a just decision. Where the appellant fails to do so, much judicial time must be spent to write the judgment. I have in my judgment in the case of CRA-41-14 of 2007-II *Public Prosecutor v Hsila bin Sulai (M)* [2007] MLJU 234 delivered on 28 May 2007 stated in strong terms that the prosecution should refrain from clogging the criminal justice system with avoidable appeals. I will add to say that simply filing a notice of appeal with a defective petition of appeal based on weak grounds does not reflect the constitutional importance which needs to be given to the appellate courts. This is a matter the prosecution must decide first in all circumstance of the case, before filing the appeal on the issue whether they will be in a position to discharge their constitutional duty to the court accordingly to law. They are required not to make the appeal look frivolous or vindictive or without substance taking into consideration the notes of evidence, grounds of judgment and established case laws. In this case, I am grateful for the written submission in relation to prima facie case filed by the Senior Federal Counsel, Puan Fazillah Begum bte Abdul Ghani as it was helpful for me to consider the issues relating to a prima facie case.

[5] The grounds of judgment of the learned magistrate, inter alia, read as follows:

The prosecution had called nine witnesses to prove their case against the offender in this case before me who sit as the Court for Children. On 28 of July, I gave my brief order which resulted in the acquittal of the offender without his defence being called. The learned deputy public prosecutor then appealed against my decision and I shall now give my full grounds in support of my decision on that day.

Evidence

PW1 was called to testify and she gave evidence that when she returned home the house was ransacked. Her mother was tied up at the toilet. Several bruises were noticed. The loss was about RM5,000 cash and jewelries. She then lodged a police report which was marked as exh P1. PW2 is the complainant in this case. She testified that she saw a man hiding beneath the table. She cannot identify that man. She felt that man was searching her body after her eyes were covered by towel.

- A** She again confirmed when she was called to ID the suspect that she couldn't remember who he was. The only thing that made she can recognized is the size of that man. PW3 testified that he arrested the offender in this case and police report was lodged. It was then marked as exh P2. The suspect then was handed over to the IO of the case. PW4 called and he testified he seized coins from the offender
- B** amounting to RM8 and lodged a seizure report. The said report was marked as exh P3. PW5 gave evidence that he went to the suspect's house. The foster father of the suspect then surrendered one unit of hand phone, one sim card and cash money amounting to RM1,000. These exhibits were given to the IO of the case. As a result, a seizure report was tendered and marked as exh P4. PW6 was the
- C** Investigating Officer in this case. He further testified that he visited the crime scene. He prepared the sketch plan. He instructed ID parade to be conducted. He confirmed that he received the exhibits from the raiding officer. The coins were then marked as exh P5. One hand phone brand NOKIA was marked as exh P6. Finally the cash amounting to RM1,000 was marked as exh P8. PW7 is the adopted father of the offender. He testified that the money of RM1,000 was given
- D** by other son and kept by his wife. Only after he knew about this case, the son withdrew and gave the money to PW 7 for safe keeping. PW8 was the officer who conducted the ID parade. He testified that the parade was made in accordance with the rule. The ID parade report was then marked by court as exh P9. PW9 was the photographer in this case. The photo taken was tendered as exh P10. That is
- E** all the summary of the evidence adduced by prosecution. ...

- At the end of prosecution case, I found that prosecution had failed to establish a prima facie case against the accused based on following evidence: (1) there was no credible nexus to implicate the accused's involvement in this case; (2) the identification parade which was conducted, to my mind, cannot be a safe ground
- F** of conviction since the complainant in her testimony positively asserted that she did not see the face of criminal on that fateful day. Mere identification as to the race is insufficient; (3) the evidence of the father has to be scrutinized with caution since the alleged confession was communicated not in accordance with criminal law; furthermore it is self incriminating statement and shall not be admitted; (4)
- G** the circumstantial evidence of RM10,000 being recovered from the father of the offender cannot be a safe ground for conviction as the money could be obtained through various means.

- For all the reason that I have stated earlier, I found that on maximum evaluation of prosecution's evidence, prosecution had failed to establish a prima facie case
- H** against the accused in this case. Therefore, I ordered the accused to be discharged and acquitted.

- I** [6] One of the salient principles of natural justice is that a person should not be condemned unheard. In the common law jurisdiction, this principle has been extended in criminal proceedings to a two stage process. In the 1st stage, it is for the prosecution to establish that there is a case against the accused. At this stage the accused need not exercise his right to be heard at all, pursuant to natural justice. If the prosecution is able to satisfy the court

according to the requirement of law then the second stage commences and at this stage it is for the accused to be heard and the court then decides whether he is guilty or not guilty.

[7] In England, this two stage process is meticulously followed in jury trials. At the first stage, the prosecution, after the opening speech, adduces evidence to support the prosecution's case and at the end closes his case by saying 'that is the case for the prosecution' or words to that effect. The defence may then, if he so wishes, submit that there is no case to answer (emphasise is mine), which has some similarities to the concept of prima facie case in Malaysia. Learned author, Christopher J. Emmins in his book *A Practical Approach to Criminal Procedure* (3rd Ed) at p 113 makes the following observations:

There is no case to answer if the prosecution have failed to adduce evidence on which a jury, properly directed by the judge in his summing up, could properly convict: *R v Galbraith* [1981] 1WLR 1039. If there is literally no evidence relating to an essential element of the offence (eg, because a prosecution witness has failed to give the evidence expected of him), a submission of no case must clearly succeed. The same applies if the prosecution rely on testimony from a witness who requires corroboration as a matter of law and there is nothing capable of being corroboration (eg, the only evidence against the accused is from an unsworn child and an adult who merely proves that the accused had the opportunity to commit the offence). A submission should also succeed if the prosecution rely on circumstantial evidence to establish an element of the offence, but the inferences they ask the jury to draw from the evidence cannot reasonably be drawn. Thus, on a charge of handling stolen goods so the judge could rule no case to answer if the only evidence of guilty knowledge is that the accused bought the goods at an under-value, but the difference between the price he paid and the true value was too small to put a reasonable man on suspicion that the goods might be stolen. Difficult problems arise where there is some evidence that the accused committed the offence but, for one reason or another, it seems unconvincing. The basic principle is that the jury should decide whether witnesses are telling the truth or not, and the judge should not usurp their function by directing them to acquit merely because he thinks the prosecution witnesses are lying — see *R v Barker*(Note) [1977] 65Cr App R 287, affirmed in *R v Galbraith*. Prior to the Court of Appeal's decision in *Galbraith*, some judges Upheld submissions on the basis that the evidence was unsafe, ie, possibly or probably perjured. A good example is *R v Beckwith* [1981] Crim LIZ 646, where the only prosecution evidence on a rape charge was that of the prosecutrix who gave evidence inconsistent with her out-of-court statements, and who had failed to complain about the rape until three months after the event when she had an argument with the accused. The judge held that there was no case to answer, but in the light of *Galbraith* it seems that he was wrong to do so — in effect, he was saying he did not believe the prosecutrix, but that was a matter for the jury not the judge. However, even in *Galbraith* the Court of Appeal affirmed that the quality of the evidence can sometimes be raised on a submission of no case. Lord Lane CJ said that where essential prosecution evidence is of a 'tenuous character' through 'inherent weakness, or vagueness or inconsistency with other evidence' so that

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- A 'taken at its highest... a jury properly directed could not properly convict upon it, it is the judge's duty... to stop the case (*R v Galbraith* at p 1042). Lord Lane seems to be drawing a distinction between a case where the prosecution evidence is prima facie strong but cross-examination suggests that the witnesses may be lying, and cases where, even in examination-in-chief, the witnesses are manifestly confused or unreliable (eg, because they have forgotten or did not have the chance to observe properly what occurred). The former type of case should be left to the jury, but in the latter situation the judge can properly uphold a submission of no case. Lord Lane's reference to evidence which is of a 'tenuous character' through 'inherent weakness' is particularly apt to describe some kinds of identification evidence. The special rules governing submissions of no case in trials turning upon identification evidence are set out below.
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- D The procedure for a submission of no case is that the jury are asked to leave court. This is so that counsel and the judge can comment freely upon the quality and significance of the evidence without the risk of the jury being influenced by what is said. Once the jury have gone, defence counsel makes his submission, and prosecuting counsel is given an opportunity to reply. The judge then announces his decision, and the jury are brought back into court. If the judge has decided that there is no case to answer on all counts, he explains briefly to the jury the decision he has reached. He then asks them to appoint a foreman to speak for them, and the clerk of court takes from the foreman on each count a verdict of not guilty upon the judge's direction. If the decision was that there is no case to answer on one or more counts, but there is a case to answer on other counts, the judge tells the jury that at the end of the trial he will be directing them to return a verdict of not guilty on the counts in respect of which there is no case, and so, for the remainder of the trial, they should ignore those counts. However, on the remaining counts, the case will proceed as normal. If the submission failed on all counts, the jury are told nothing of what went on in their absence.
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- G Assuming there is a prosecution case to answer, the next stage of the trial is for the defence to present their case. Since it is for the prosecution to prove each element of the offence charged beyond reasonable doubt, the defence are under no obligation to adduce any evidence whatsoever. Defence counsel can, without calling evidence of his own, submit to the jury in a closing speech that the accused should be acquitted as the prosecution evidence fails to establish their case to the requisite standard of proof. Such a strategy may be right when the prosecution's case is weak, but in general there are obvious dangers in the jury only hearing evidence favouring the prosecution. It is therefore unusual for the defence not to call evidence.
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- I [8] In the above passage, the learned author does not use the term 'credible evidence' or 'maximum' or 'minimum' evaluation. Further, a quick perusal of the standard text books written by well known authors will show that, in respect of the above two stages I have mentioned, no such terms are mentioned relating to criminal procedure or evidence in England. Similarly, I

am not able to find such terminologies by Indian authors, as the law, practice and procedure relating to Criminal Procedure and Evidence have much similarity.

[9] In Malaysia the two stages of the criminal proceedings is captured in s 173(f) of the CPC for trial before the subordinate courts and s 180 for trials before the High Court. There is a distinction in contrast with England. In England, the defence has an option to submit no case to answer, failing which the accused may give evidence or refuse to do so and it is for the jury to decide whether the prosecution has proven the case beyond reasonable doubt. The jury does not decide this issue at the prosecution stage. The fact that the jury only decides at the second stage and not the first stage is one important distinction. Under the CPC, there is a statutory duty for the prosecution to establish a prima facie case before the court is obliged to call for the defence. That is not the position in England. Thus, it will appear that there is a greater statutory protection given to the accused here, in contrast to England. The courts have on various occasions asserted that legal burden entrusted on the prosecution by statute at the first stage must be discharged according to the required standard of proof that being beyond reasonable doubt and nothing less (now it is subject to the test and caveat expounded by the Federal Court in *Balachandran*). In consequence, and because the position in England is not the same, there is a veritable explosion of cases in this area of law trying to explain the concept in various manner, which the prosecution in this case has attempted to highlight without giving any conclusive submission as to what is prima facie case, notwithstanding the clear guidance shown by Augustine Paul FCJ in the case of *Balachandran* and similar views were expressed by Gopal Sri Ram JCA in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and also whilst sitting in the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 where the learned Judge opined:

For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

- (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
- (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be

A called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

B (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

C [10] As the crux of the issue related to this appeal materially depends on the question of prima facie case, in my view to appreciate and understand this concept in the right perspective, it is essential to read the relevant provisions of the CPC with EA 1950. In almost all the cases which dealt with the issue relating to prima facie case, the courts did not deal with the EA 1950 and in my view much confusion has been caused, before the decision of the Federal Court in *Balachandran*.

D [11] A prima facie case materially consists of more than two concepts related to EA 1950. They are issues relating to standard of proof (see ss 101 to 103 EA 1950) and weight of evidence or also referred to as probative value or probative force (see s 3 of EA 1950). A prima facie case cannot be equated to burden of proof alone. Further, a prima facie case cannot be equated to the concept of maximum evaluation of evidence only. However, to define a prima facie case, the element relating to the standard of proof and weight of evidence becomes inextricably interwoven. The phrase maximum evaluation or minimum evaluation or credible evidence is not a term of art used in common law jurisprudence in the law relating to evidence. The nearest equivalent to this term in the law of evidence will be in my view, weight of evidence or probative value etc. Further maximum or minimum evaluation or credible evidence does not relate to standard of proof. Because these terminologies, when they first appeared in Malaysian cases, were not explained within the regime of EA 1950, they may in my view have lead to much confusion and this is reflected in the submission of the prosecution, as the prosecution had relied on the following cases namely: (i) *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; (ii) *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; (iii) *Public Prosecutor v Tan Sri Muhammad bin Muhammad Taib* [1999] 2 MLJ 305; (iv) *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480; (v) *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; (vi) *Arulpragasam Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; (vii) *Hwa Tua Tau v Public Prosecutor* [1981] 1 CLJ 123; (viii) *Tan Chai Keh v Public Prosecutor* [1948 – 49] SUPP 105; (ix) *Public Prosecutor v Kasmin Soeb* [1974] 1 MLJ 230; (x) *Khoo Hi Chiang v Public Prosecutor and Another appeal* [1994] 1 MLJ 265; (xi) *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; (xii) *Public Prosecutor v Krishna Rao all Gurumurthi* [2000] 1 MLJ 274; (xiii) *Public Prosecutor v Dato' Seri Anwar*

Ibrahim (No 3) [1999] 2 MLJ 1; (xiv) *Public Prosecutor v Sukumaran all Sudram* [1999] 4 MLJ 462; (xv) *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 (xv) *Public Prosecutor v Chin Yoke* [1940] MLJ 47; (xvi) *Public Prosecutor v Mohan Singh* [1999] MLJU 218; (xvii) *Balachandran v Public Prosecutor* [2005] 2 MLJ 301.

[12] The word 'proof' means anything, which serves to convince the mind about the truth or falsehood of a proposition. Under s 3 of EA 1950 a fact is said to be proved when after considering the matters before it, the court either: (a) believes it to exist; or (b) considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. The extent to which a particular piece of evidence aids to prove a fact in issue is called its probative force. It is necessary for the probative force to be sufficient to induce the court: (i) to believe in the existence of the fact; and/or (ii) to consider its existence so probable that a prudent man may act upon the supposition that it exists. The test whether a matter has been proved or not is objective in nature and the test is—would a prudent man, after considering the matters before him deem the fact in issue proved or disproved. The word 'disproved' is exactly the opposite of 'proved' and is defined again in s 3 of EA 1950 to emphasise its importance. A fact is said to be disproved when, after considering the matter before it, the court either: (a) believes that it does not exist; or (b) considers its non-existence so probable, that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. The term 'not proved' is explained in s 3 of the EA 1950. A fact is said to be not proved when: (a) it is neither proved; (b) nor disproved. When a fact has not been proved by the party on whom the burden lies, that is to say, when the said party has given no evidence or has given evidence, which is not sufficient to establish the fact, the fact is said to be not proved. There is a useful maxim: 'falsus in uno falsus in omnibus' which means if a thing is false in respect of one it must be taken to be false in respect of all (see *Nisar Ali v State of UP* AIR 1957 SC 366). This maxim does not occupy the status of law in Malaysia. However, sometimes, counsels do argue that if a part of the evidence given by a witness has been disbelieved, the whole of it should also be disbelieved, as a rule of law. In my view, such line of argument may hold water now in this juncture, provided the judge is convinced at the prima facie stage that a prudent man ought to, under the circumstances of the particular case, act upon the supposition that it does not exist.

[13] When a person is bound to prove the existence or non-existence of any fact, then it is said that the burden of proof lies on that person. Burden of proof can be defined as the obligation, which is imposed on a party to adduce sufficient evidence in support of his vital contention to result in over all

- A success by him in his case. This is sometimes referred to by some authors as burden of proof simpliciter or the persuasive burden or probative burden or the risk of non-persuasion or burden of proof on the pleadings or fixed burden of proof or ultimate burden etc. The relationship between 'fact in issue' and 'burden of proof' is that, facts in issue are vital issues central to the
- B allegation of the party and failure by him to adduce sufficient evidence in support of a fact in issue means that he has failed to discharge the legal burden and thus he will fail in his over all contention. Thus, it can be said that proof of 'fact in issue' is the sine qua non for establishing legal burden. In deciding the 'fact in issue', maximum evaluation test as asserted by the
- C Federal Court in *Balachandran* must be meticulously followed.

- [14] In *Woolmington v DPP* [1935] AC 462, the facts were that Woolmington was charged with murder. The trial judge directed the jury that once the prosecution had proved the killing, they should presume it to be
- D murder unless the defendant proved facts justifying a verdict of manslaughter or an acquittal on the ground of accident. The defendant appealed to the House of Lords arguing misdirection on the burden of proof. The appeal was successful and the conviction was quashed. It was decided that:

- E In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt
- F whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

Lord Sankey LC observed:

- G If at any period of trial it was permissible for the judge to rule that the prosecution had established its case, and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case, and not the jury, which is not the Common Law. It would be an entirely different
- H case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt. Just as there is evidence on behalf of the
- I prosecution so there may be evidence on behalf of the prisoner, which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence...

Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... No matter what the charge matter what the or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

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[15] The phrase 'burden of proof' has two distinct meanings in the law of evidence as follows: (a) burden of establishing a case; and (b) burden of introducing evidence [see s 101 of EA 1950]. For example,

- (a) In *Public Prosecutor v Yuvaraj*, the Privy Council, in relation to burden of proof as per statue, distinguished the leading case of *Woolmington v DPP* and stated:

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Wolmington v DPP is not in their Lordships' view germane to the present appeal. It was concerned with an offence at common law, not with an offence as to which there is an express statutory provision altering the ordinary onus of proof which in a criminal case lies upon the prosecution and imposing upon the defendant the burden of proving the existence or non-existence of a particular fact by way of defence.

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- (b) In *Mat v Public Prosecutor* [1963] MLJ 263, Suffian J (as His Lordship then was) observed:

the correct law of Magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

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- (c) In *Saminathan v Public Prosecutor* [1955] 21 MLJ 121, the court among other things considered the rules of evidence with regard to burden of proof in civil and criminal cases. Buhagir J observed:

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Submissions are frequently made in criminal trials to the effect that there is a fundamental difference in the law of evidence in criminal and in civil cases and that in criminal cases the burden of proof on the prosecution is different from that on the defence. In civil cases, it is said, a preponderance of probabilities is sufficient but in criminal cases the prisoner's guilt must be proved beyond reasonable doubt; with regard to the defence in criminal cases it is said the burden of proof is not as high as that of the prosecution and that if the defence raises a reasonable doubt or if there is a preponderance of probabilities in favour of the accused, the accused is entitled to an acquittal.

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- A Some confusion arises by the use of unreflective clinches and by recourse to English decisions and to statements therein without consideration to the relevant rules of evidence incorporated in the Evidence Ordinance 1950.
- B There is no question that in English law and in this country there are important differences in the kind of evidence which is admissible in civil and in criminal cases, because it is felt that some kinds of evidence which are admitted in civil cases would unfairly prejudice the accused in criminal cases (see per Lush J in *Hurst v Evans*); but apart from such exceptions there is no difference in other
- C application of the rules of evidence to civil and criminal cases, to prosecution and defence, and on the evidence admitted, the methods of demonstration and inference do not differ in civil and criminal cases.
- D It is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases.
- (d) In *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, the Federal Court stated:
- E Moreover, although the Criminal Procedure Code (FMS Cap 6) ('the CPC') has been amended to include the test of prima facie case, the amendment would apply only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to
- F any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test as laid down in *Arulpragasam*, i.e. that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply because the amendment is not couched in terms, either expressly or by necessary implication, which would make it retrospective in operation.
- G All the above cases and many more now must be read in the light of *Balachandran*.
- H [16] The burden of establishing a case in a criminal trial always remains with the prosecution and in a civil case, subject to certain exceptions, always remains with the plaintiff. However, the burden of introducing evidence may shift. Burden of introducing evidence is often called evidential burden. For example, A says that B has committed the murder. Here the burden of proof is on A to prove that B has committed the murder. The legal burden always rests on A to prove his case. If B relies on the defence of provocation then B
- I has the evidential burden to adduce evidence to that effect before the prosecution is put to the legal burden of negating the defence.

[17] In *Mancini v DPP (HL)* [1942] AC 1, it was held that the accused had to discharge the evidential burden relating to a charge of provocation before the prosecution was put to the legal burden of negating the defence. In *R v Gill* [1963] 2 All ER 688, the English Court of Appeal stated that if a defendant wishes to raise a particular defence to a charge then he must raise the defence. Once he has succeeded in doing this then it is for the Crown to destroy that defence in such manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged defence. Thus, evidential burden is the burden of adducing sufficient evidence on any given issue, to justify a favourable finding of fact on that issue. Evidential burden shifts from one party to another throughout the course of the case. However, the legal burden asserting the affirmative proposition does not shift. Thus, at the stage of prima facie case, the legal burden on the prosecution asserting the affirmative proposition does not shift. If the prosecution succeeds in establishing a 'prima facie' case then the evidential burden immediately shifts to the defence. The test as to who bears the evidential burden is determined by the fact which party would be likely to fail in his submission about that particular issue, if no further evidence were adduced.

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[18] I must say here that the phrases legal burden and evidential burden have often been confused. In *Jayasena v R* [1970] AC 618, Lord Devlin rejected the phrase 'evidential burden of proof' and said that it is a contradiction in terms. He stated that 'evidential burden' is only the burden of adducing evidence. For example, raising a doubt is where there is no duty to prove, whereas 'legal burden' is the burden of proving a case, by convincing the court to believe in the existence or non existence of a fact. Notwithstanding Lord Devlin's rejection, this phrase is often used in judgments and by leading authors. The EA 1950 read with the relevant provision of CPC relating to a prima facie case is more specific in stating on whom the burden lies compared to the common law, where at times legal burden in criminal cases and civil cases may shift from the prosecution to the accused and from plaintiff to the defendant, respectively. In this respect, the English books and cases should be referred to with caution.

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[19] Standard of proof refers to the degree or strength or probative force required to discharge a burden. At common law it is now almost trite that in all criminal cases the prosecution has to prove its case beyond reasonable doubt and in civil cases the plaintiff has to prove his case on the balance of probability. In *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J (as His Lordship then was) stated the nature of proof in criminal cases in these terms:

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- A It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community of it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable, 'the case is proved beyond reasonable doubt, but nothing short of that will suffice.
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In *R v Summers* 36 Cr App R14, Lord Godard CJ observed:

- C If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty, that is much better than using the expression 'reasonable doubt' and I hope in future that will be done.

- D [20] In *Ferguson v R* [1979] 1 WLR 94, the trial court's direction that you must be satisfied beyond reasonable doubt that you feel sure of the defendant's guilt was generally upheld as safe and sufficient by the Privy Council. In *R v Ching* [1976] 63 Cr App R7, the Court of Appeal on the issue of standard of proof in criminal case made this comment:

- E We point out and emphasize that if judges stopped trying to define that which is almost impossible to define there would be fewer appeals.

- F [21] In England, there are certain exceptional cases where the defence bears the legal burden of proof as opposed to evidential burden. In such a situation, the court in *R v Carr-Briant* [1943] KB 607 has held that the standard of proof required by the defence is not higher than the burden which rests upon a plaintiff or a defendant in civil proceedings.

- G [22] The term 'prima facie case' in our context is normally referred to the burden placed on the prosecution at the end of its case, before the judge calls the accused to enter his defence. A prima facie case is defined by *Osborne's Concise Law Dictionary* as follows:

- H A case in which there is some evidence in support of the charge or allegation made in it, and which will stand unless it is displaced. In a case which is being heard in court, the party starting, that it upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer, and the case will have to be dismissed.

- I *Blackstone's Law Dictionary* defines prima facie case as:

A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. Courts use concept of 'prima facie case' in two senses: (1) in the sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favour of the allegation he asserts; this means

the plaintiff's evidence is sufficient to allow his case to go to the jury, and (2) courts use 'prima facie' to mean not only that the plaintiff's evidence would reasonably allow the conclusion the plaintiff seeks, but also that the plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it.

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Mozley and Whiteley's Law Dictionary states:

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A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

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[23] It is a cardinal principle of our criminal law that the legal burden of proving the facts in issue is upon the prosecution. This proposition will stand good now, only upon the end of the defence case and not necessarily at the end of the prosecution case. This is so despite the fact that the prosecution must satisfy the court at that stage that taking all the evidence into account the prosecution can maintain they have a case beyond reasonable doubt and the court can convict the accused if he offers no evidence and/or elect to remain silent. Under the principle enunciated in *Hwa Tua Tua*, the court must re-evaluate the evidence again at the close of the defence case, although the accused chooses not to give evidence and consider whether the prosecution has established their case beyond reasonable doubt. This is no more the position now. If the defence is called to give evidence and he chooses to remain silent, the court must convict unless the defence has elected to give a dock statement, etc. or some evidence is adduced on behalf of the accused through the prosecution witnesses, etc, at the defence stage for the court to at least reconsider its decision.

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[24] The proposition what amounts to a prima facie case was well articulated by Augustine Paul J (as he then was) in *Public Prosecutor v Dato' Seri Anwar Ibrahim*, as early as 1999 at a time where the general view of judges and sages of law who then took the position that the Amendment to CPC in 1997 relating to prima facie case has reintroduced the principles enunciated in *Hwa Tua Tau* (more in favour of the prosecution) and overruled the dynamic exposition of law (more in favour of the defence) in *Arulpragasam all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 (FC). In my view, the present test of what amounts to prima facie case is hybrid in nature as to what was said in *Hwa Tua Tau* and *Arulpragasam*, as garnered from the decision in *Dato' Seri Anwar bin Ibrahim's* case where Augustine Paul J (as he then was) opined:

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A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it

- A is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.
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In *Balachandran*, the learned judge of the Federal Court opined:

- C Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.
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[25] Now in *Balachandran*, the learned judge of the Federal Court has clearly set out the test for prima facie and I hereby summarise what was said for the benefit of the adjudicators in subordinate courts as follows:

- F (i) A prima facie case is established where there is sufficient evidence to be called upon to answer and evidence adduced by the prosecution must be such that it can only be overthrown upon hearing evidence in rebuttal by the defence to the prosecution case.
- G (ii) The force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts that exist did not happen [see definition of 'facts', 'facts in issue' and 'proved' in s 3 of EA 1950 — to be read with ss 101 to 103 of EA 1950].
- H (iii) A prima facie case is not made out if there is no material evidence which can be believed in the sense as described earlier, [see definition of 'disproved' and 'not proved' in s 3 of EA 1950].
- I (iv) To make a finding either way, the court must at the close of the prosecution case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offences have been established.

- (v) Once a prima facie case is established and the accused elects to remain silent, he must be convicted. The test at the close of the prosecution case would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case. A B
- (vi) As the accused can be convicted on the prima facie evidence, it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. C

Further, the learned judge of the Federal Court opined that:

As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt. D E F

It follows that the submission of learned counsel that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a prima facie basis is contrary to the clear and plain language of s 180 and s 182A. It cannot therefore be sustained. G

[26] Applying the test for a prima facie case propounded in *Balachandran*, I am inclined to accept the finding of the learned magistrate that the prosecution has not established a prima facie case. My reasons are as follows: H

- (i) One of the elements of the offence in this case is that the prosecution must establish that it was the respondent who robbed the victim. From the facts of the case, the victim says that she did not see the robber's face and cannot identify him. Based on that evidence an identification I

A parade is an exercise in futility. Section 9 of EA 1950 deals with the law in respect of identification and states as follows:

B Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted are relevant so far as they are necessary for that purpose.

C ILLUSTRATIONS

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- (a) ...;
 - (b) ...;
 - (c) ...;
 - (d) ...;
 - (e) ...;
 - (f) ...

E This section is grounded on the principle of *res gestae*. It refers to five categories of relevant facts, which may be given in evidence in relation to s 5 of EA 1950. They are as follows: (a) facts explaining or introducing a fact in issue or relevant fact; (b) facts supporting or rebutting the inference suggested by a fact in issue or relevant fact; (c) facts establishing the identity of anything or any person whose identity is relevant; (d) facts fixing the time or place at which a fact in issue or relevant fact happened; (e) facts showing the relation of the parties to the transaction under enquiry. Section 9 paves the way to establish the identity of a person or thing by various ways including by way of identity parade, photographs, finger prints, photofits, etc. In *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232, it was stated that there was a distinction between recognition and identification. Recognition is more reliable than mere identification [see *Public Prosecutor v Basar* [1965] 1 MLJ 75; *Public Prosecutor v Sarjeet Singh* [1994] 2 MLJ 290]. Evidence is always allowed to be given of facts, which are necessary to introduce the main fact or some relevant fact. However, the facts which are stated in section 9 are weaker and of less probative value and may have no meaning if they stood independently. However, they acquire probative value if connected with other facts. When the identity of any person is relevant, then every fact which will be helpful in identifying the person is relevant under s 9. Identification parades are usually held by police with an

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object of enabling eye witnesses of the incident to identify the accused. Generally such identification will be used for corroboration. [see *Chan Sin v Public Prosecutor* [1949] 15 MLJ 106, *R v Turnbull* [1977] QB 224].

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The identity in this case is a vital issue central to the allegation of the prosecution and failure by the prosecution to adduce sufficient evidence in support of a fact in issue means that prosecution has failed to discharge the legal burden and thus the prosecution must fail in its over all contentions. This is what s 3 of EA 1950 says and the learned magistrate as a matter of fact had come to that conclusion and I do not see any reason to disturb the finding, since that finding is consistent to the test propounded in Balachandran's case.

B

C

- (ii) The appellant says there is sufficient corroborative evidence to implicate the respondent on the ground that the foster father of the accused surrendered to the police one unit of hand phone, one sim card and cash money amounting to RM1,000. I do not see how this evidence can positively refer to the respondent applying the maximum evaluation test. I do not think that on the facts of this instance, this piece of evidence will have any corroborative value.

D

E

[27] In this case, the learned magistrate has rejected the evidence of the foster father. There is no evidence directly or indirectly to implicate the respondent. In consequence, it is unsafe to call for the defence. For reasons stated above, I dismiss the prosecution's appeal. I hereby order so.

F

Appeal dismissed.

Reported by Chew Phye Ken

G

H

I